UNITED
NATIONS

A

General Assembly

Distr.
GENERAL

A/CN.9/SR.640
17 May 1999

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Thirty-first session

SUMMARY RECORD OF THE 640th MEETING

Held at Headquarters, New York,
on Friday, 5 June 1998, at 10 a.m.

Chairman: Mr. MAZILU (Romania)

CONTENTS

PRIVATELY FINANCED INFRASTRUCTURE PROJECTS (continued)

This record is subject to correction.

Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent within one week of the date of this document to the Chief, Official Records Editing Section, room DC2-750, 2 United Nations Plaza.

Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

98-80757 (E)

The meeting was called to order at 10.15 a.m.

PRIVATELY FINANCED INFRASTRUCTURE PROJECTS: continued (A/CN.9/444/Add.4 and Add.5)

1. The CHAIRMAN invited the Commission to resume its consideration of draft chapter III of the legislative guide on privately financed infrastructure projects (A/CN.9/444/Add.4).

Paragraphs 76-82

2. Mr. LALIVE (France) said that his previous comments on the distinction between procurement and public service delegation also applied to the recommendations and notes under consideration, which sought to adapt the provisions of the UNCITRAL Model Law on Procurement of Goods, Construction and Services to privately financed infrastructure projects. Accordingly, the text emphasized the importance of price as a criterion for the award of contracts. However, under French and European law, the concept of price related primarily to procurement, whereas public service delegation agreements specified the financial terms of payments to be provided to the contractor. Such payments were usually financed, at least in part, by fees charged to the users of the works or services, as in the case of toll roads. Financial and payment terms were important selection criteria, since they affected both the users and the two parties to the contract, and the quality and continuity of the service provided and equality of access to them were equally important parameters.

3. Paragraphs 76 and 79 of the notes were surprisingly brief, considering the fact that they dealt with the way in which the two parties negotiated the terms of the contract. The system described in draft chapter III emphasized the selection process, whereas French and European law tended to shift the emphasis to the final negotiation phase. As conditions varied in different countries, he could accept that change of emphasis. However, it was important to eliminate any implication that contractual terms could be negotiated in any way during the selection process. In particular, paragraph 79 of the notes should refer only to technical and financial terms and not to contractual terms.

4. Mr. NIELSEN (Denmark), referring to item 4 of the agenda, said that the last sentence of paragraph 79 did not seem to provide any useful guidance. It was clear that the awarding entity would engage in discussions with any project consortium with which they had already been terminated unless there were sound reasons for doing so, in which case the law or regulations governing such negotiations would not be respected.

5. Mr. WALLACE (United States of America), replying to the representative of France, noted that draft chapter III clearly implied that contractual terms would be included in some form in the list of requirements for proposals. Following the initial response, the project authority, including contractual terms, would be prepared or refined by the preferred entity and then refined at a subsequent stage. If contractual documents were provided to bidders along with technical and financial documents, fairly negotiations would be required in the final phase and the entire process would be expedited. If countries

accepted the selection model described in the legislative guide, they would have to adjust their methods accordingly.

6. With respect to the last sentence of paragraph 79, he noted that it applied only to unsuccessful bidders; it did not say that negotiations should not be reopened with the successful bidder, and was therefore consistent with the UNCITRAL Model Law on Procurement of Goods, Construction and Services.

7. Mr. CHOUKRI (Observer for Morocco) said, with respect to paragraph 80 of the notes, that the notice of project award was very important for ensuring transparency in the host Government's relations with the private-sector contractor and with the general public. Accordingly, the price of the proposal should be mentioned in the notice.

8. Mr. ESTRELLA FARIA (International Trade Law Branch) drew attention to the text in brackets following paragraph 77 of the notes, which acknowledged that the notion of "price" under traditional public procurement systems might not be fully applicable to the selection procedure being proposed. Instead, countries might focus on how payment to the contractor was to be effected.

9. Mr. GILL (India) pointed out that, after a request for proposals had been issued, changes in a country's political situation or other circumstances might prevent the Government from opening the bids. He asked whether the legislative guide would include information on the procedures to be followed in such cases.

10. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the legislative guide had not been intended to be so detailed as to specify what States should do when a procurement exercise was cancelled for some reason. In such cases, States would have to refer to the general procurement regime.

11. Mr. LALLIOT (France) said that he understood the importance of financial terms in the award of contracts, but that other parameters should be considered as well and should reflect the nature of the contract in question. With respect to the comment made by the representative of the United States, the proposal of a lengthy preselection process and a short final negotiation phase was only one of several possible approaches to developing an effective procedure for the award of contracts; shifting the emphasis from one phase to another would not necessarily change the time required for the completion of the entire process.

12. Mr. CHOUKRI (Observer for Morocco) agreed with the representative of France that price should not be the only criterion for the award of contracts. Quality and efficiency were also important criteria.

Paragraphs 81-93

13. Mr. WALLACE (United States of America) drew attention to paragraph 85 of the notes and questioned whether it was realistic to expect that private financing modalities would be used for projects that were urgent or of short duration. Such modalities were normally used in relation to larger projects for which the negotiations themselves took a long time. Moreover, in referring to "direct negotiations", the text did not specify whether such negotiations would involve informal competition or no competition at all.

14. Paragraphs 87 to 93 of the notes provided suggestions concerning the difficult problem of how to respond to sole-source proposals in an encouraging manner without abandoning competition. However, the solutions proposed were not ideal. With respect to recommendation 24, he asked whether it was assumed that a company which submitted an unsolicited proposal should have met some minimum qualification requirements. He also asked whether the paragraphs on unsolicited proposals excluded the possibility of sole-source procurement.

15. Mr. GUISLAIN (Observer for the World Bank) said he would prefer to substitute "allowed" for "encouraged ... whenever possible" in the first sentence of paragraph 82. In paragraph 83, it should be made clear whether the negotiations in question were being conducted with a single provider or whether they were parallel negotiations with a number of different providers. The last sentence of paragraph 83 was not necessarily correct: where an awarding authority chose to engage in comparative negotiations, it was usually because it was not entirely certain what was wanted from the project and was willing to consider a broad range of proposals. For example, if the project involved the construction of a road, different proposals might be submitted for different routes. In such cases the criterion for selection would rarely be price alone, since the awarding authority would be choosing among different packages.

16. In practice, there were many different methods of procurement, and the Commission should not confine itself to a single model. However, some safeguards should be suggested for cases in which Governments had opted for a sole-sourcing approach or for direct negotiations. Clear objectives should be set for performance and outputs, and there should be precise qualification criteria; water supply, for example, must meet international standards. In order to ascertain whether proposals met those standards, awarding authorities conducting direct negotiations must have excellent advisers.

17. Commenting on paragraphs 85 and 86 (Circumstances authorizing the use of direct negotiations), he suggested that the law should contain a rule that competitive tendering should be the standard practice, with exceptions allowable only by a higher authority, as under a presidential decree or a cabinet decision. Paragraph 85 (a), which pertained to legislative recommendation 20 (a), was not workable as it stood: even if an emergency situation, such as a breakdown in power supply, was the fault of the awarding authority, failure to intervene was not justifiable. Another situation justifying direct negotiations might be a lack of experience in privately financed infrastructure projects or a lack of capacity to launch the tendering process. In such cases, private companies might well be in a position to play an advisory role vis-à-vis the Government.

18. Ms. MUSOLINO (Australia), referring to recommendation 23, said it would be desirable to indicate roughly what length of time was meant by the phrase "a minimum number of years". It should also be specified that the company which submitted the original proposal should be invited as part of a competitive selection procedure.

19. Ms. ALLEN (United Kingdom) said she wished to add to the list of circumstances warranting direct negotiations a situation in which there was only

one feasible source of supply, perhaps for artistic or intellectual property reasons.

20. Mr. LALLIOT (France) suggested a further addition. The emergency situations mentioned by the representative of the United States included cases where the concessionaire, having qualified through a pre-selection procedure, failed to perform the works and had to be replaced. He agreed with the representative of the United Kingdom that there were other situations such as those involving products subject to a licence or patent held by a single supplier. A third set of circumstances justifying direct negotiations might be defence contracts or contracts for works with secrecy implications where the higher interests of the State had to be protected. Such cases were already provided for in French and European law.

21. Mr. LAMBERTZ (Observer for Sweden) reiterated that it was not the Commission's role to recommend that Governments should opt for competition rather than direct negotiations, at least not in a legislative guide. If that was the Commission's view, it should be framed in more neutral language, and should not be reflected in the recommendations. The statements in recommendations 20 and 21 did not constitute legislative advice, and should appear only in the commentary. He agreed with the observer for the World Bank that the provision in recommendation 20 (a) was unworkable as it stood.

22. He further agreed with the observer for the World Bank that unsolicited proposals must meet precise quality standards. However, recommendations 22, 23 and 24 were not legislative statements and should not be included in the recommendations. In Sweden, it would be impossible to legislate along the lines suggested in recommendation 23; the advice contained there should therefore be moved to the commentary and given less prominence. The recommendations in general had more to do with fairness and common sense than with legislative action.

23. Mr. LIU Yang (China) could not agree that certain recommendations should be dropped or moved to the commentary. The Secretariat had thoroughly considered the various problems that might arise with direct negotiations, such as a lack of transparency or abuses of government authority. The recommendations were sound and could be very useful in drafting future legislation in China. The ultimate purpose of preferring competitive selection to direct negotiations was to secure greater openness and transparency of procedures among private enterprises working in the public sector. That was fully consistent with the direction currently being taken in China.

24. With regard to the financing of projects, it was often the case that proposals were not made between the Government and the consortia bidding for a project, but were instead generated in direct negotiations - in other words, they were unsolicited proposals. To guard against the possibility of abuse in such negotiations, paragraph 85 might mention the host country's rules on emergency situations and the need for openness and transparency.

25. In the section dealing with unsolicited proposals (paras. 87-89) it should be made clear that the party negotiating with private enterprises on behalf of the Government might itself be a business entity authorized to do so by the

/...

Government. Accordingly, the term "host Government" in paragraph 87 should perhaps be altered to read "government authorities".

26. Mr. OLIVENCIA RUIZ (Spain), referring to the remarks of the observer for Sweden, said that the tone of the recommendations varied somewhat and might therefore prove disorienting to legislators. Recommendation 1 stated that it was advisable to devise a method promoting competition, yet the language used in recommendation 20 to advise against direct negotiations was quite peremptory, at least in the Spanish version, which used the verb "deber". His delegation considered such a tone to be inappropriate. The proposals in the draft guide were not normative ones, to be incorporated into domestic legislation and adapted if necessary; they were a set of rules of conduct, in which imperative statements should be avoided. The guide should state merely what was advisable and rational. It should make clear that there was a preference for competitive procedures and briefly state the grounds on which exceptions would be justified, such as emergency and cost, leaving them open to debate and review. As for the transparency requirement, it applied to all circumstances, even exceptional ones.

27. Mr. MARKUS (Observer for Switzerland) agreed with the representative of Spain. The recommendations were framed in terms of policy, and the examples given in paragraph 85 of circumstances authorizing the use of direct negotiations were not very well chosen. The representative of the United States had suggested adding cases in which a State had no experience of privately financed infrastructure projects. However, the aim of the Commission's work was to show Governments how to handle such projects, thus completing work begun by the United Nations Industrial Development Organization (UNIDO). A reference to lack of experience might simply be used as an excuse for resorting to direct negotiations. It was of course true, as the representative of the United Kingdom had said, that in cases involving intellectual property rights there might be no choice to exercise.

28. Mr. WALLACE (United States of America) said he agreed with the representative of Spain that model provisions were not meant to be advisory; Governments clearly had the choice of accepting or rejecting them. As currently drafted, however, the recommendations appeared to take the form of instructions to Governments.

29. With regard to paragraph 85, it was important to make a distinction between procurement policy and its application to privately financed infrastructure projects. The Model Law also addressed the question of urgency and the need to provide explanations for following exceptional selection procedures. It was unclear, however, whether direct negotiation meant negotiations with just one party or with several. It was also unlikely that in an emergency private funding would be sought for such projects. Considerations of national security were also explicitly provided for in the Model Law, but again, it was unlikely that private financing would be sought in a matter involving national security.

30. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the language of the recommendations might seem prescriptive because of the difficulty in finding a translation of "should", which carried the same weight in French and Spanish as in English. To clarify the point raised by the representative of

China, the authority awarding the project had competence over running that public service. With regard to the views expressed on paragraph 85 (a), it was unlikely that urgency would be invoked in order to build new infrastructure, but rather to maintain continuity and prevent a service from being interrupted. The second sentence of that paragraph was intended to address a situation where a public authority knew that a service had been interrupted but invoked urgency in order to avoid the accepted selection procedures.

31. Ms. ALLEN (United Kingdom) said that it had been suggested that using the term "should" softened the language of the draft, but in her view it was actually quite a strong term.

32. Ms. POLLICOT (France) said that, with regard to direct negotiations, it might be simpler just to refer to article 51 of the Model Law.

The meeting was suspended at 11.45 a.m. and resumed at 12.15 p.m.

Paragraphs 94-99

33. Mr. WALLACE (United States of America) suggested that an additional recommendation could be added dealing with the review procedure discussed in paragraph 94. The paragraphs on the record of selection proceedings should also make clear the need to preserve the confidentiality of proprietary information, something that had been done in the Model Law.

34. Ms. MOSCOLINO (Australia), referring to the final bracketed paragraph in italics, said that it would be sufficient to refer to the relevant privacy and freedom-of-information legislation in each country.

35. Mr. CHOUKRI (Observer for Morocco) said that the usefulness of certification for unsolicited proposals (para. 99 (b)) was not clear to him. He requested clarification of its effect on the position of the investor and its potential legal implications. He also wondered whether such certification was merely a formality or whether it had a substantive purpose.

36. Mr. ESTRELLA FARIA (International Trade Law Branch) said that paragraph 99 (b) had been inspired by national legislation on unsolicited proposals. Its purpose was to provide internal accountability for host Governments. The question of its legal effects, however, exceeded the scope of the legislative guide and would have to be settled under the rules of the host country.

37. Mr. GUILLAIN (Observer for the World Bank) said that, in addition to the information listed in paragraph 98, it would be useful to include the qualifications of the company and benchmarks from the awarding authority. Those elements could also be incorporated into paragraph 99. The text in italics should be expanded to cover publicity and should distinguish clearly between the kinds of information that should be made available and the kinds that should not.

38. The CHAIRMAN said that it was his understanding that the text of document A/CN.9/444/Add.4, as amended, could be accepted. He then invited the Commission to consider draft chapter IV of the legislative guide (A/CN.9/444/Add.5).

Paragraphs 1-14

39. Mr. WALLACE (United States of America) pointed out that it would not be wise for the legislative guide to suggest that legislation should establish the terms of a project agreement. The purpose of legislation was to remove obstacles to the conclusion of such agreements. The method varied from country to country: in some countries, a single agreement sufficed, while other countries required several. Governments should retain the freedom to conclude any agreements that might be necessary. The final sentence of paragraph 2 described a legislative approach that was followed in some countries; however, the Commission should not appear to suggest that it was a good one.

40. The final sentence of paragraph 5 acknowledged that the entry into force of project agreements sometimes required an act of law. In his delegation's view, the legislative guide should suggest models under which it would not be necessary to seek parliamentary approval for each project agreement. Furthermore, paragraphs 5 and 6 should recommend that legislation should clearly specify who had the power to award a contract and who had the power to sign an agreement. The process should be as simple as possible, in order to avoid delays and abuses.

41. Mr. LAMBERTZ (Observer for Sweden) said that recommendation 1 seemed to suggest that the Commission was proposing that Governments should not enact legislation regarding contract law. The legislative guide should in fact recommend the establishment of provisions that would give useful guidance to the contracting parties. The purpose of paragraph 2 was to indicate that a Government should not impose specific laws concerning the content of the project agreement, and the paragraph should be reworded to convey that idea. It might be useful to employ wording of the kind used in paragraph 4: "Therefore it is advisable to limit the scope of legislative provisions concerning the project agreement to those strictly necessary." In recommendation 2, the words "to have simple procedures" should replace "to simplify procedures".

42. Mr. LALLIOT (France) said that the text was both too prescriptive and too descriptive. The objective of the guide was to present a range of options, and their advantages and disadvantages, and to indicate which options were preferable. Governments were then free to establish their own practices.

43. Replying to the representative of the United States, he said that an act of parliament was sometimes necessary for the approval of a project agreement; that possibility should be allowed to stand. In order to construct the Eurotunnel, for example, France had concluded an international agreement with the United Kingdom, for which, under the terms of the French Constitution, the Government had been required to seek the approval of Parliament. When it had become necessary to modify the terms of the original agreement, parliamentary approval had again been sought. As unusual as such cases might be, that possibility must be allowed to remain.

44. Ms. NIKINJAM (Islamic Republic of Iran) said that under the Iranian Constitution, Parliament was required to approve all international agreements. Since a privately financed infrastructure project was an agreement between the Government and a foreign company, it could be considered to be an international agreement; the approval process would therefore be long and cumbersome. In her delegation's view, the legislative guide should suggest the possibility of amending such constitutional provisions to exempt agreements with private foreign companies.

45. Mr. GUISLAIN (Observer for the World Bank) suggested that the final sentence of paragraph 5 of the notes should simply be dropped: some countries required parliamentary approval of project agreements, and the Commission could not proscribe that approach. And yet, examining the terms of a contract was not inherently a legislative activity, and often occasioned lengthy delays. Furthermore, in some countries, such projects simply called for licences. Licences, however, sometimes had to be negotiated as well. What the guide termed "the project agreement" could in fact be many agreements; the guide should perhaps reflect that fact.

46. Paragraph 5 was crucial, and called for further consideration. In some countries, major delays in the completion of project ag.eements had arisen from the failure of legislation to specify clearly what parties were authorized to act - for example, who could launch a tender for a privately financed infrastructure project, who could negotiate, who could participate in an awarding committee and who was authorized to sign a contract. The legislative guide should recommend that legislation should specifically address such points.

47. Lastly, the term "host Governments" should not be seen as including local Governments. When local author'ties concluded contracts for privately financed infrastructure projects, they often had to seek the approval of other levels of Government, and such requirements varied from country to country. That was a matter that should be addressed in the guide, whether in the section under consideration or elsewhere.

48. Mr. GILL (India) said that it was of course very difficult to obtain parliamentary approval for a project agreement. In his delegation's view, there were two possible approaches: the guide could set out model procedures for the signature of an agreement by a legislature, or else suggest that under certain circumstances project agreements could be approved and signed only by the executive power.

49. Mr. LALLIOT (France) said that a legislative guide could not purport to address the distribution of powers among the legislative and executive branches of sovereign States. The final sentence of paragraph 5 clearly stated that it was the entry into force of the project agreement that was subject to parliamentary approval. That did not mean that parliament was empowered to pronounce with regard to the content of the contract. Parliament could accept or reject entry into force, but it could not modify the contract's terms. Such an approach made sense because it was the contracting parties that established the terms of the contract; it also prevented delays in the start of the project. Accordingly, the sentence in question should stand.

/...

50. Mr. CHOUKRI (Observer for Morocco) said that the approval of project agreements relating to financed infrastructure projects should rest with the executive power, not with the legislature. The sentence should be redrafted to read: "Sometimes the entry into force of the project agreement depends on the enactment of a special law", thus removing the words "parliamentary act", which created unnecessary confusion. The guide should also indicate that parliament had the right to ask the Government for information. That should not, however, affect the launching of projects approved and signed by the executive power.

51. Mr. MARADIAGA (Honduras) said that the guide called for transparency in the establishment of privately financed infrastructure projects; the process should in effect be as rapid and dynamic as the market itself. When, however, such project agreements were subject to approval by legislatures, the process was often long and tedious. It was therefore crucial that the guide should establish a process that would guarantee promptness and transparency.

The meeting rose at 1 p.m.